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David H. Van...  
County of Santa Clara, California

By: [Signature]

1 Arthur A. Hartinger (SBN: 121521)  
ahartinger@meyersnave.com  
2 Linda M. Ross (SBN: 133874)  
lross@meyersnave.com  
3 Jennifer L. Nock (SBN: 160663)  
jnock@meyersnave.com  
4 Michael C. Hughes (SBN: 215694)  
mhughes@meyersnave.com  
5 MEYERS, NAVE, RIBACK, SILVER & WILSON  
555 12<sup>th</sup> Street, Suite 1500  
6 Oakland, California 94607  
Telephone: (510) 808-2000  
7 Facsimile: (510) 444-1108

8 Attorneys for Defendant and Cross-Complainant  
City of San Jose

9  
10 IN THE SUPERIOR COURT FOR THE  
11 COUNTY OF SANTA CLARA

12 SAN JOSE POLICE OFFICERS  
ASSOCIATION,

13 Plaintiff,

14 v.

15 CITY OF SAN JOSE, BOARD OF  
ADMINISTRATION FOR POLICE AND  
16 FIRE RETIREMENT PLAN OF CITY OF  
SAN JOSE, and DOES 1-10 inclusive.,

17 Defendants.

18  
19 AND RELATED CROSS-COMPLAINT  
20 AND CONSOLIDATED ACTIONS  
21

Case No. 1-12-CV-225926

[Consolidated with Case Nos. 112CV225928,  
112CV226570, 112CV226574, 112CV227864]

DEFENDANT CITY OF SAN JOSE'S  
EVIDENCE IN SUPPORT OF ITS  
OPPOSITION TO PLAINTIFFS' MOTION  
FOR A PRELIMINARY INJUNCTION;  
REQUEST FOR JUDICIAL NOTICE

Date: March 5, 2013  
Time: 9:00 a.m.  
Dept.: 8

BY FAX

Complaint Filed: June 6, 2012  
Trial Date: None Set

22 On February 7, 2013 in this case, the City of San Jose filed a Motion for Summary  
23 Adjudication of Issues. In support of that motion, the City of San Jose filed (1) a Request for  
24 Judicial Notice ("City's MSA RJN") and (2) a Declaration of Alex Gurza ("Gurza MSA Dec.").  
25 The City's Motion for Summary Adjudication is set for hearing on April 23, 2013, and the Court  
26 has not yet ruled on the City's MSA RJN.

27 ///

28  
DEFENDANT'S EVIDENCE IN SUPPORT OF ITS OPPOSITION TO  
MOTION FOR A PRELIMINARY INJUNCTION; REQUEST FOR JUDICIAL NOTICE

Case No. 112CV225926

1           **Motion for Summary Adjudication Submissions.** The City hereby submits the City's  
2 MSA RJN and the Gurza MSA Dec. in support of its current Opposition to Plaintiffs' Motion for a  
3 Preliminary Injunction. For purposes of its Opposition, the City requests that the Court take  
4 judicial notice of all exhibits in the MSA RJN for the same reasons stated therein.

5           Throughout its Opposition to Plaintiffs' Motion for a Preliminary Injunction, the City will  
6 cite to the "City's MSA RJN" and the "Gurz MSA Dec."

7           **Additional Declaration Submitted in Opposition to Motion for Preliminary**  
8 **Injunction.** Under separate cover, the City has submitted a Declaration of Jennifer Schembri in  
9 Support of its Opposition to Plaintiff's Motion for a Preliminary Injunction. Throughout its  
10 opposition, the City will cite to this declaration as the "Schembri Dec."

11           **Request for Judicial Notice.** The City also submits this Request For Judicial Notice,  
12 which will be referred to as "2/20/13 RJN," in which it asks the Court to take judicial notice  
13 pursuant to California Evidence Code Sections 450 *et seq.*, and in accordance with California  
14 Rules of Court 3.1113(l), 3.1306(c), and 3.1350(c)(5) of the following material, true and correct  
15 copies of which are attached hereto:

16           **Exhibit 1: Ballot Argument – Rebuttal to Argument Against Measure B.**

17           This ballot argument states that:

18           A Stanford report found that San Jose public safety retirees' average annual  
19 pension benefit (\$90,612) is the highest of any independent pension system in  
20 California. [http://siepr.stanford.edu/system/files/shared/pubs/papers/pdf/Nation](http://siepr.stanford.edu/system/files/shared/pubs/papers/pdf/Nation%20More%20Pension.pdf)  
21 [More Pension.pdf](http://siepr.stanford.edu/system/files/shared/pubs/papers/pdf/Nation%20More%20Pension.pdf)

22           The City Auditor found that disability retirements among San Jose's sworn  
23 employees are considerably higher than other jurisdictions and 67% of fire  
24 retirees were receiving disability retirement payments. Some employees granted  
25 disability retirements were working full time in their regular job right up to when  
26 they separated from the City. The Auditor recommended the City Charter be  
27 amended to reform the system.  
28 <http://www.sanjoseca.gov/auditor/AuditReports/1102/1102.pdf>

29           This ballot argument can be found on the San Jose City Clerk's website at:

30 <http://www.sanjoseca.gov/DocumentCenter/Home/View/286>.

1           **Exhibit 2:** San Jose City Auditor Report, "Disability Retirement: A Program In Need Of  
2 Reform," dated 4/14/11 and referred to in the "Ballot Argument – Rebuttal to Argument Against  
3 Measure B" (Exhibit 1 herein).

4           Exhibits 1 and 2 are properly subject to judicial notice as legislative history and  
5 governmental acts and records. Cal. Evid. Code §452(b), (c), & (h); *Kaufman & Broad*  
6 *Communities, Inc. v. Performance Plastering, Inc.*, 133 Cal. App. 4th 26, 31 (2005); *Pacific Legal*  
7 *Foundation v. Cal. Coastal Commission*, 33 Cal.3d 158, 162-63 n.1 (1982) ("Statements in ballot  
8 arguments in support of a successful initiative measure are properly considered as evidence of the  
9 intent behind the measure.").

10           For these reasons, the City respectfully requests that the Court take judicial notice of the  
11 above-listed documents.

12           DATED: February 20, 2013

MEYERS, NAVE, RIBACK, SILVER & WILSON

13  
14  
15           By: 

16           Arthur A. Hartinger  
17           Linda M. Ross  
18           Jennifer L. Nock  
19           Michael C. Hughes  
20           Attorneys for Defendant  
21  
22  
23  
24  
25  
26  
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# EXHIBIT 1

## **Rebuttal to Argument Against Measure B**

Measure B follows California law. The California Constitution grants the City authority to change employee compensation. The City Charter gives voters the right to change retirement benefits. The Municipal Code allows the City to require employees to pay more for retirement benefits, which is an element of Governor Brown's pension reforms and was recommended by the Santa Clara County Grand Jury.

Governor's Proposal:

[http://gov.ca.gov/docs/Twelve\\_Point\\_Pension\\_Reform\\_10.27.11.pdf](http://gov.ca.gov/docs/Twelve_Point_Pension_Reform_10.27.11.pdf)

Grand Jury Report:

[http://www.scsccourt.org/court\\_divisions/civil/cgj/2010/CitiesMustReinInUnsustainableEmployeeCosts.pdf](http://www.scsccourt.org/court_divisions/civil/cgj/2010/CitiesMustReinInUnsustainableEmployeeCosts.pdf)

Measure B would also allow employees who wish to pay less for retirement benefits to choose a lower cost optional plan that saves them and the City money.

Upon voter approval of Measure B, the city will immediately seek a judicial review to minimize the cost of legal disputes. See the legal opinion of outside counsel:

<http://www.sanjoseca.gov/mayor/goals/budget/PDF/MeyersNavePublicLegalOpinion.pdf>

A Stanford report found that San Jose public safety retirees' average annual pension benefit (\$90,612) is the highest of any independent pension system in California.

[http://siepr.stanford.edu/system/files/shared/pubs/papers/pdf/Nation\\_More\\_Pension.pdf](http://siepr.stanford.edu/system/files/shared/pubs/papers/pdf/Nation_More_Pension.pdf)

The City Auditor found that disability retirements among San Jose's sworn employees are considerably higher than other jurisdictions and 67% of fire retirees were receiving disability retirement payments. Some employees granted disability retirements were working full time in their regular job right up to when they separated from the City. The Auditor recommended the City Charter be amended to reform the system.

<http://www.sanjoseca.gov/auditor/AuditReports/1102/1102.pdf>

The City engaged in hundreds of hours of negotiations with 11 employee unions, including 20 sessions with state mediators, but was unable to reach agreement on language for Measure B.

**Vote yes on Measure B.**

[www.sanjosefiscalreforms.com](http://www.sanjosefiscalreforms.com)

**Rebuttal to Argument Against Measure B**  
**Order of Signers**

Marcia Fritz, President, California Foundation for Fiscal Responsibility

Dakin Sloss, Director, California Common Sense

James Duran, Chair, Hispanic Chamber of Commerce, Silicon Valley

Brian J. Blach, Pension Consultant

Donald P. Gagliardi, Attorney at Law

## EXHIBIT 2



Office of the City Auditor

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Report to the City Council  
City of San José

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**DISABILITY RETIREMENT:  
A PROGRAM IN NEED OF  
REFORM**

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Report 11-02  
April 2011



April 14, 2011

Honorable Mayor and Members  
Of the City Council  
200 East Santa Clara Street  
San José, CA 95113

## **Disability Retirement: A Program in Need of Reform**

The City Charter provides for the establishment of a retirement system for City employees, and establishes minimum disability benefits for all covered employees. Employees who are members of the Police & Fire Department Retirement Plan are eligible for minimum disability retirement benefits of 50 percent of compensation, and employees who are members of the Federated City Employees' Retirement System are eligible for minimum disability retirement benefits of 40 percent of compensation.

**The Rate of Disability Retirements Among San José's Sworn Employees Is Unacceptably High.** In San José, 2 out of 3 Fire personnel, and more than 1 out of 3 Police personnel are retiring on a service-connected disability, compared to 1 out of 16 non-sworn (Federated) personnel. Furthermore, we found some employees who were granted disability retirements were working full time in their regular job right up to when they separated from the City; others were working full time in modified duty positions. The sworn service-connected disability rates in particular (which by definition, mean employees are permanently disabled from doing their jobs) are higher than other jurisdictions, and beg the question of whether or not San José is a safe place to work. While additional improvements can be made, and fitness can be improved, the City appears to operate a well-established safety program. Factors contributing to the high rate of disability retirements include:

- Substantial economic incentives associated with disability retirement.
- An environment that produces a high number of workplace injury claims.
- Restrictive eligibility requirements that force the Retirement Boards to retire-out anyone for whom the City cannot find an alternative position.

A more independent process for reviewing and approving disability retirements is essential. In addition, the City's eligibility requirements for a disability retirement need reform – potentially requiring a Charter change.

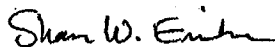
**Some Disabled Retirees Have Already Been Compensated for Their Work-Related Injuries.** Both the City's Disability Retirement Program (administered by the City's retirement plans) and the Workers' Compensation Program were established to fairly compensate employees for a work-related injury. During this audit we found that the City amply compensated its disability retirees – first

through workers' compensation payments, and then through disability retirement payments. In our April 2009 report on the City's Workers' Compensation Program, we highlighted this issue and recommended the City amend the Municipal Code to establish a retirement benefit payment offset for sworn employees that replicates the offset already in place for retired non-sworn employees. The lack of a disability offset for sworn employees cost the City an estimated \$2.8 million in 2009.

**Sick Leave Overpayments Should Be Addressed.** The City of San José pays for accumulated sick leave upon retirement. The amount is reduced for sworn employees who retire on disability. In cases of a retroactive change from service to disability retirement, repayments can be difficult to collect. As of March 2011, \$149,000 was owed to the City by nine former employees. We recommend the City aggressively collect those outstanding balances. If sick leave payouts are not eliminated as part of contract negotiations, payouts should be reduced when a disability retirement is pending to avoid future overpayments.

We will present this report at the April 21, 2011 meeting of the Public Safety, Finance, and Strategic Support Committee. We would like to thank Retirement Services, Human Resources, Finance, and the City Manager's Office for their time and cooperation during the audit process. The Administration has reviewed the information in this report and their response is shown on the yellow page.

Respectfully submitted,



Sharon W. Erickson  
City Auditor

finaltr  
SE:lg

Audit Team: Steve Hendrickson  
Robin Opheim

cc: Alex Gurza	Allen Demers	Mollie Dent
Russell Crosby	Rajiv Das	Deanna Santana
Debra Figone	John Dam	Nadine Nader
Donna Busse	William McDonald	Jennifer Schembri
Kay Winer	Juan Diaz	

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## **Introduction**

In accordance with the City Auditor's 2009-10 Audit Work Plan, we have completed an audit of the City of San José's Disability Retirement Program. We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. We limited our work to those areas specified in the Objective, Scope, and Methodology section of this report.

The City Auditor's Office thanks the management and staff of the Department of Retirement Services, the Human Resources Department, the City Physician, the Finance Department, and the City Manager's Office for their time and cooperation during this audit.

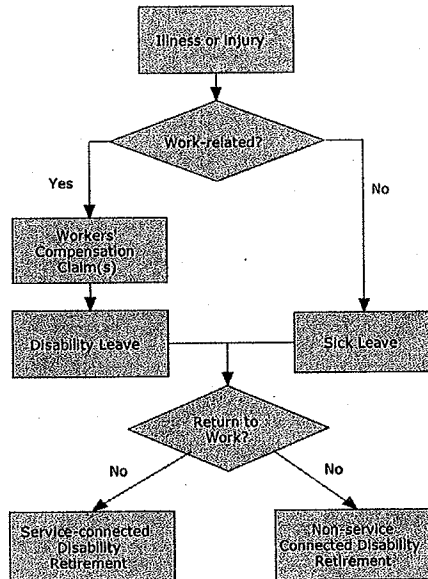
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### **Background**

Severe illness or injury can force an incapacitated employee to retire from City employment. The City of San José is self-insured for workers' compensation (meaning it pays its own claims) in case of workplace injury, and provides retirement benefits through its two pension systems – the Police & Fire Department Retirement Plan (Police & Fire) and the Federated City Employees' Retirement System (Federated).

As shown in Exhibit I, workers' compensation and retirement benefits depend on whether the precipitating event was work-related.

**Exhibit I: Was the Precipitating Event Work-Related?**



**Laws, Rules & Regulations, and Authoritative Standards**

The City Charter provides for the establishment of a retirement system for all officers and employees of the City, and establishes minimum disability benefits for all covered employees.

*Disability Benefits for Sworn Employees*

For sworn employees, the minimum disability retirement allowance outlined in the City Charter is 50 percent of final compensation for employees who have completed at least 20 years of service, are disabled while holding such office or employment, and apply for such retirement while holding such office or employment.

The City Charter defines disability for sworn personnel as:

*the incurrance of a disability, short of death, of permanent duration, resulting from injury or disease, which renders the officer or employee incapable of continuing to satisfactorily assume the responsibilities and perform the duties and functions of his or her office or position and of any other office or position **in the same classification** of offices or positions to which the City may offer to transfer him or her; provided, however, that such a disability shall be **deemed to be of permanent***

*duration if the City or any of its authorized agencies finds that such disability will continue at least until the disabled person attains the age of fifty-five (55) years. [Emphasis added.]*

The Municipal Code distinguishes between service-connected and non-service connected disability retirements. The Municipal Code makes a service-connected disability retirement available to all sworn employees with no minimum service requirement or reduction factor due to age. The Municipal Code also provides that sworn employees with a minimum of 2 years participation in the Police & Fire Plan are eligible for non-service connected disability retirement benefits.<sup>1</sup>

#### *Disability Benefits for Federated Employees*

The City Charter further specifies that Federated (non-sworn) employees who have completed at least 10 years of service, are disabled while holding such office or employment, and apply for a disability retirement while holding such office or employment, are eligible for a disability allowance as provided in the Municipal Code – currently a minimum of 40 percent. The City Charter defines disability for Federated employees as:

*the incurrance of a disability, short of death, resulting from injury or disease, which renders the officer or employee incapable of continuing to satisfactorily assume the responsibilities and perform the duties and functions of his or her office or position and of any other office or position **in the same classification** of offices or positions to which the City may offer to transfer him or her. [Emphasis added.]*

The Municipal Code makes a service-connected disability retirement available to all Federated employees with no minimum service requirement or reduction factor due to age (the benefit is offset by certain workers' compensation payments). The Municipal Code also provides that Federated employees with at least 5 years of service are also eligible for a non-service connected disability retirement.<sup>2</sup>

<sup>1</sup> For Police & Fire members, the non-service connected disability benefit is 32 percent of final compensation plus 1 percent of final compensation for each additional year of service.

<sup>2</sup> For Federated members, the base non-service connected disability retirement allowance is 40 percent of the final average salary. The allowance is reduced by 0.5 percent of final compensation for each year an employee's age is under 55. If an employee was hired on or after September 1, 1998, the benefit is 20 percent of final compensation, plus 2 percent per year of service in excess of six but less than 16, plus 2.5 percent for years of service in excess of sixteen.



## Disability Retirement

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### *Findings Required for a Disability Retirement*

The Municipal Code requires physician certification of physical disability:

*The retirement board...shall, order a medical examination of a member to determine whether the member is disabled or incapacitated for the performance of duty, and to determine whether such disability or incapacity for performance of duty is a service-connected or non-service-connected disability....*

### *Tax-Exempt Service-Connected Disability Retirement Income*

The Federal government and most individual State governments have enacted laws that provide for various portions of workers' compensation and disability retirement payments to be tax-free. For San José's disabled retirees, the base minimum disability retirement amount of 50 percent of final compensation for sworn, and 40 percent of final compensation for Federated is generally tax free.<sup>3</sup> Retirement allowances above those base disability pension amounts are generally taxable.

### *Outside Earnings*

The vast majority of San José disabled retirees are not required to report to the City any earnings they receive from outside employment. However, sworn retirees until 20 years have elapsed since they entered the retirement plan and Federated employees who are under the age of 55 must regularly report their outside earnings to the Retirement Services Department (the department). Retirees who earn beyond a given threshold will have their monthly retirement payments reduced by the department. The department has established procedures and controls to properly track outside earnings; currently 70 retirees are reporting to the department and their monthly retirement benefits are being adjusted where appropriate.

## **Roles and Responsibilities**

### *Retirement Boards*

The City's Municipal Code establishes separate retirement systems for Federated and Police & Fire employees, created the Boards of Administration for each system, and documents the rules and regulations for City officers' and employees' participation in the systems and receiving system benefits upon retirement.

The Federated City Employees' Retirement System is administered by a seven-member Board of Administration composed of four members of the public, two City employees, each from a different City department, who are members of the Federated City Employees Retirement System, and one person who retired under

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<sup>3</sup> Non-service connected disability retirement is generally taxable.

the provisions of the Federated City Employees Retirement System. The board is appointed by the City Council and serves in accordance with Section 2.08.1080 of the San José Municipal Code.

The Police & Fire Department Retirement Plan is administered by a nine-member Board of Administration composed of five members of the public, two Plan members, one from the Police Department and one from the Fire Department; and two members who have retired under the provisions of the Plan, one from the Fire Department and one from the Police Department. The board is appointed by the City Council and serves in accordance with Section 2.08.1250 of the San José Municipal Code.

It should be noted that the composition of the boards has recently changed. The current public members of the two boards were appointed in December 2010 and February 2011.

### *The Boards Approve Retirements and Changes in Status*

Both boards review and approve or deny retiring employees' requests for (1) service retirements, (2) service-connected disability retirements, and (3) non-service connected disability retirements. In addition, the boards review and approve or deny "Requests for Change in Status" when employees who previously were service retired wish to convert to a disability retirement.

According to the retirement plan handbooks, sworn employees have one year from the date of separation or service retirement to apply for a disability retirement and request the board review their case for change in status, and the time frame for Federated employees to file is within 4 months of discontinuing City service or if their disability continues after they have stopped working.

### *The Boards' Medical Director*

The boards' Medical Director provides a valuable service in the disability determination process. On behalf of both Retirement Boards, he summarizes medical reports, assesses whether the injury or injuries are work-related and permanent, and also assesses the extent of medical restrictions.

The boards' Medical Director also serves as the City Physician and is involved with the City's workers' compensation process. In that capacity he reviews injured workers' case files, evaluates medical treatments outside physicians perform, participates on workers' compensation claims evaluation teams, and assists Workers' Compensation Claims Adjusters with the State's required Utilization Review process.

## Disability Retirement

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### *Return-To-Work Programs*

The City's Return-To-Work Program Coordinator has responsibility solely for accommodating the return to work of injured Federated employees. The Police Department and Fire Department conduct Return-To-Work programs independently at the department level.

On the Federated side, the Return-To-Work Coordinator has the ability to accommodate disabled employees in either temporary or permanent modified duty positions either within their home department or in another department, increasing the chance of returning an injured employee to work fairly quickly.

In the Police Department, a Consent Decree has established a two-tiered system consisting of up to 45 permanent modified duty positions. With the number of injured police officers in the department at any one time, this program may or may not be available to some of them.

The Fire Department's Return-To-Work Program can only accommodate injured workers in temporary modified duty positions. There are no permanent modified duty positions available in the Fire Department. This situation often results in the injured firefighter remaining on disability leave of absence until they are retired from City service.

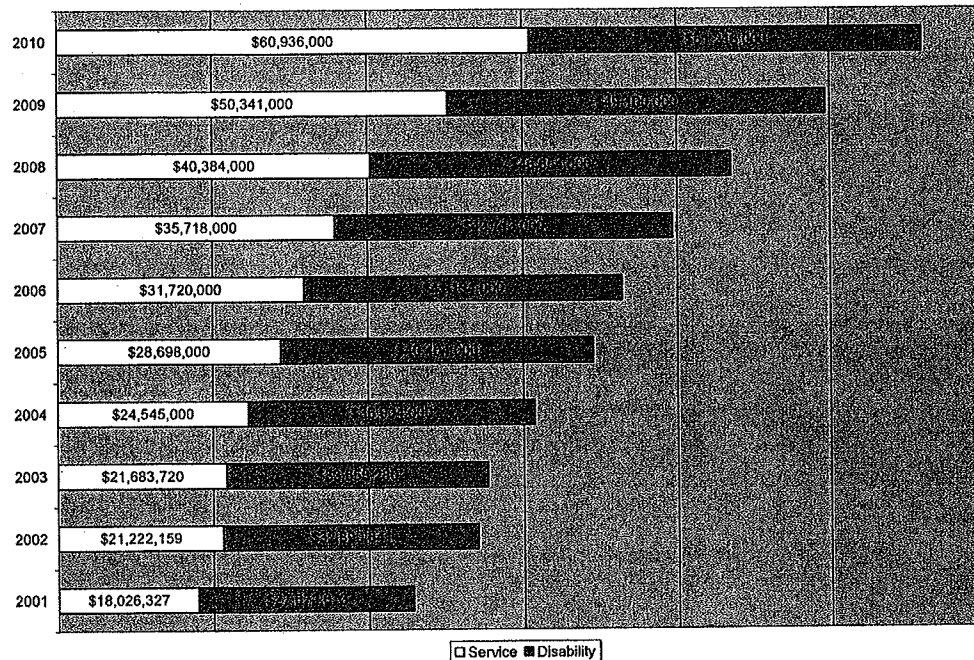
### **Disability Retirement Benefit Costs**

In FY 2009-10, Federated paid about \$3.8 million in service-connected disability retirement benefits (and about \$2.6 million in non-service-connected disability retirement benefits) out of total benefit payments of \$105.7 million.

Police & Fire paid about \$54.9 million in service-connected disability retirement benefits (and about \$0.8 million in non-service-connected disability retirement benefits) or nearly half of total benefit payments of \$121.1 million in FY 2009-10.

Exhibit 2 compares service retirement payments to service-connected disability retirement payments made to sworn personnel over the last 11 years.

**Exhibit 2: City of San José Police and Fire Service Retirement and Service-Connected Disability Retirement Payments FY 2000-01 Through 2009-10**



Source: State Controller's Reports FY 2000-01 through FY 2004-05; Police and Fire Retirement Plan Comprehensive Annual Financial Report for FY 2009-10. Does not include payments for non-service-connected disability, deferred vested, or survivorship benefits.

As these figures show, disability retirement is a significant portion of total benefit payments – particularly for Police & Fire. However, it should be noted that disability retirements increase the retirement plans' total benefit costs only to the extent that an employee "retires early". If the employee is age and service eligible, the benefit cost to the plan is the same as if the employee had service-retired. As is discussed later in this report, it appears that a large number of disability retirees are service and age eligible. In those instances, the additional "cost" of disability retirement is manifested through the loss of Federal and State income tax revenue.

### Scope and Methodology

The objective of our audit was to assess potential factors leading to a high disability retirement rate in the City of San José. To achieve the audit objective we:

## Disability Retirement

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- Reviewed Federated City Employees' Retirement System agendas and meeting minutes for calendar years 2000 through 2010;
- Reviewed Police & Fire Department Employees Retirement Plan agendas and meeting minutes for calendar years 2000 through 2010;
- Attended Federated and Police & Fire Retirement Board meetings;
- Surveyed other jurisdictions;
- Reviewed the City Charter and City Municipal Code sections addressing disability retirement;
- Reviewed the Federated and Police & Fire plans' handbooks and benefits information;
- Reviewed California State Controller's Public Retirement Systems Annual Reports for fiscal years 2000-01 through 2007-08;
- Interviewed Retirement Services staff;
- Reviewed the Police and Fire Retirement Plan and Federated City Employees' Retirement System Comprehensive Annual Financial Reports for FY 2009-10;
- Randomly selected a sample of Police & Fire and Federated retirees applying for service-connected disability retirement or applying for a change in status from service retirement to service-connected disability retirement from each of the years 2006 through 2010;
- Reviewed workers' compensation claims and payments for the sample of selected employees;
- Reviewed sick leave payout agreements in the Police and Fire MOAs;
- Obtained sick leave payout billing information from the Finance Department; and
- Interviewed the City Physician, the Return-to-Work Coordinator, and the Fire Department Safety Officer.

## **Finding I    The Rate of Disability Retirements Among San José's Sworn Employees Is Unacceptably High**

In San José, 2 out of 3 Fire personnel, and more than 1 out of 3 Police personnel are retiring on service-connected disability, compared to 1 out of 16 non-sworn (Federated) personnel. These sworn disability retirement rates are higher in San José than elsewhere. Furthermore, we found some employees who were granted disability retirements were working full time in their regular job right up to when they separated from the City; others were working full time in modified duty positions.

Having 2 out of 3 firefighters retiring on a disability retirement (which by definition, means they are permanently disabled from doing their Fire Department jobs) begs the question of whether or not San José is a safe place to work or if this is a result of other, non-safety factors. While additional improvements can be made and fitness can be improved, the City operates a well-established safety program. Factors contributing to the high rate of disability retirement include:

- The substantial economic incentives associated with a disability retirement.
- An environment that produces a high number of workplace injury claims.
- Restrictive eligibility requirements that force the retirement boards to retire-out anyone for whom the City cannot find an alternative position, resulting in the Police & Fire Retirement Board approving 94 percent of disability retirements between 2000 and 2010.

A more independent process for reviewing and approving disability retirements is essential. In addition, the City's eligibility requirements for a disability retirement need reform – potentially requiring a Charter change.

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### **In San José, 2 Out of 3 Fire Personnel, and More Than 1 Out of 3 Police Personnel Are Retiring on Disability**

Disability retirements among San José's sworn employees are significantly higher than among San José's non-sworn (Federated) employees. As shown in Exhibit 3, the Retirement Services Department February 2011 payroll report (a summary of all former employees receiving a monthly retirement payment) shows 67 percent of Fire retirees and 41 percent of Police retirees were receiving disability retirement payments, compared to 6 percent of Federated retirees.

## Disability Retirement

**Exhibit 3: Retirement Payroll as of February 2011<sup>4</sup>**

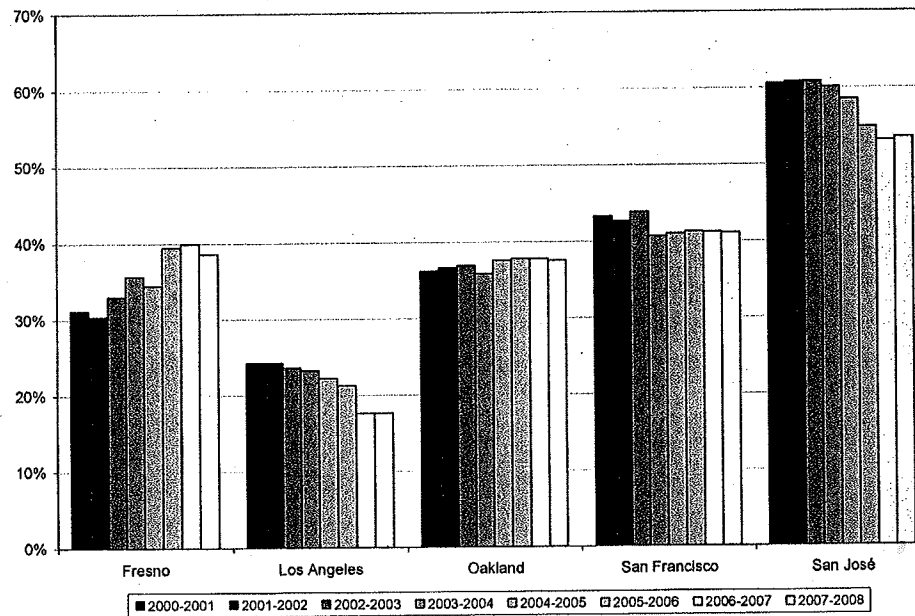
	Fire	Police	Federated	Total
Disability retirements	428	362	129	919
Service retirements	214	522	2,188	2,924
Total	642	884	2,317	3,843
Percent Disability	67%	41%	6%	24%

Source: Retirement Services Department February 2011 Payroll Report

## Sworn Disability Retirement Rates Are Higher in San José Than Elsewhere

Disability retirements among San José's sworn employees are considerably higher than in other jurisdictions. Exhibit 4 shows San José and other California jurisdictions' disability retirement payments as a percentage of total retirement payments. Between fiscal year 2000-01 and 2007-08, an average of 58 percent of payments made to San José's sworn employees (Police and Fire combined) were for service-connected disability retirements. By way of comparison, disability retirement payments to sworn employees in Oakland were made an average of 37 percent of the time.

**Exhibit 4: Comparison of Sworn Service-Connected Disability Retirement Payments as a Percentage of Total Retirement Payments**



Source: December 2010 California State Controller Public Retirement System Annual Report for the fiscal year ended June 30, 2008.

<sup>4</sup> Deferred vested, early, and non-service connected disability retirements were excluded in order to directly compare service retirements to disability retirements.

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**Is San José a Safe Workplace?**

Having 2 out of 3 firefighters retiring on a disability retirement (which by definition, means they are permanently disabled from doing their Fire Department jobs) begs the question of whether or not our firefighters are adhering to safe practices in the workplace or if this is a result of other, non-safety factors.

**2007 Study on Impact of Working Conditions on Disability Retirement**

In June 2007, the Human Resources Department produced a study, *"San Jose Police and Fire Departments Impact of Working Conditions on Disability Retirement"*. The study found that working conditions, defined as demand for services and staffing to meet the demand, staffing of fire apparatus, and workplace safety had an insignificant impact on the Fire Department's disability retirement rate. Specifically,

- The Fire disability retirement rate had fluctuated between 39 percent and 90 percent in the period between 2001-2006, with an overall average of 67 percent as compared to an average of 40 percent of public safety retirees in the other surveyed California cities.
- The lack of a permanent modified duty program prevented the City from providing modified duties to employees who are permanently unable to return to full duty. This may have been contributing to a higher rate of disability retirement since there were no places to assign employees with permanent work restrictions.

The study also found that working conditions, defined as demand for Police services, staffing to meet the demand, and workplace safety had an insignificant impact on the disability retirement rate. Specifically,

- San José had the lowest number of calls for service per year per sworn position at 305 as compared to an average of 430 in the California cities surveyed, making San José 29 percent below the average.
- The Police disability retirement rate had fluctuated between 22 percent and 43 percent between 2001-2006, with an overall average of 31 percent as compared to an average of 40 percent of public safety retirees in California cities.

In addition, the study found that while the San José Police & Fire Retirement Board directly reviews retirement applications, most other retirement boards normally refer the initial evaluation to another independent panel or hearing officer.



### **2009 Audit of Workers' Compensation**

In our 2009 *Audit of the City of San José's Workers' Compensation Program*, we reported that the City's workers' compensation claims and their cost were higher than other comparable cities and counties. In fiscal year 2007-08, the cost of medical treatments, and the cost of payments to temporarily disabled workers who were off work was \$24.3 million. More recently, in fiscal year 2009-10, the City's total workers' compensation costs totaled about \$30.9 million and are expected to increase in 2010-2011 to approximately \$32.7 million.

This is in spite of the fact that the City operates well-established safety and return-to-work programs. Our 2009 report included a total of seven recommendations to address escalating costs, ensure injured employees return to work as soon as medical conditions allow, implement wellness programs, and ensure accountability for a safe workplace.<sup>5</sup> Although some occupations were more dangerous than others, many of the injuries we reviewed as part of that audit were orthopedic injuries or stress from physical exertion. Our audit did not uncover evidence that San José was an unsafe workplace.

### **Firefighter Fitness**

One possible area of further inquiry to help explain the high rate of injuries among San José firefighters would be the firefighters' fitness. Our April 2009 audit recommended restoring the Wellness Coordinator position and implementing a comprehensive wellness-fitness program in the Fire Department.

Each year, the San José Fire Department (SJFD) performs an annual Health Risk Assessment for firefighters. A vendor, Club One, performs the assessment and summarizes the results for SJFD. Body fat, blood pressure, treadmill exercise, push-ups, and back flexibility are some of the fitness areas that are assessed using national minimum standards for fitness the International Association of Fire Fighters Wellness-Fitness Initiative Task Force has developed.

The SJFD annual Health Risk Assessment records for the past three years show that about 25 percent of the department's firefighters have not met these minimum standards. The department provides each firefighter with a written copy of the results of their individual assessment; however, corrective action is not required.

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<sup>5</sup> As of March 2011, five of the seven recommendations were already implemented or closed. Two of those recommendations were still open: (1) to establish a disability retirement pension offset for workers' compensation benefits paid after retirement for sworn personnel (similar to that already in place for non-sworn personnel), and (2) enhancing the Fire Department's wellness program. The current status of these recommendations is discussed further in this report and in the City Auditor's *Semi-Annual Recommendation Follow-up Report* (<http://www.sanjoseca.gov/auditor/AuditRecom.asp>).

The City of Gilroy's MOU with its firefighters includes an incentive program to meet national minimum standards for fitness. Fitness is assessed biannually and a "fit score" is calculated for each test. The incentive program pays Gilroy firefighters \$25 per point on the fit score with a maximum of \$750 biannually.

The City and International Association of Firefighters, Local 230, recently entered into an agreement to establish a pilot Wellness Program. Through this 2-year pilot program, sworn personnel represented by Local 230 will participate in semi-annual fitness evaluations. Each employee will receive a "fit score" and those employees whose fit score falls below a specific threshold will be required to participate in a fitness program while on duty.

The SJFD also is coordinating with Employee Health Services (EHS), to implement the City Physician's changes to the firefighters' annual medical examination, including implementation of Cardio Stress EKG Testing as recommended by the International Association of Fire Chiefs and the International Association of Firefighters Wellness - Fitness Initiative for Firefighters.

In addition, the SJFD is soliciting a vendor to act as the Wellness Coordinator/Trainer for the department and to help implement changes to the department's annual medical exam program. The Wellness Coordinator/Trainer would follow up with those firefighters who were assessed with one or more health risks to work with them to make themselves fit.

**Recommendation #1: We recommend the City fully implement, with a goal of making permanent, the Fire Department's pilot Wellness Program requiring that all firefighters must meet minimum fitness standards (including proposed changes to the firefighters' annual fitness examination) or be on a corrective action plan to achieve a minimum standard of fitness.**

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#### **The Economic Incentives Associated with a Disability Retirement Are Substantial**

A key factor that seems to correspond with the City's high rate of disability retirements is the economic incentives associated with retiring on a service-connected disability retirement. There is a considerable economic advantage to the employee being paid a service-connected disability retirement over a regular service retirement. The minimum service-connected disability retirement of 50 percent is exempt from the Federal and State income tax for Police & Fire members, and the minimum service-connected disability retirement of 40 percent is tax exempt for Federated members.

## Disability Retirement

To illustrate the impact of the exemption from State and Federal taxes associated with a service-connected disability retirement, Exhibit 5 shows two hypothetical retirees and the potential tax benefits of a disability retirement – even after a full 30-year career with the City.

**Exhibit 5: Tax Benefits of Disability Retirement**

	<b>Sworn</b>	<b>Federated</b>
Pre-retirement final annual average salary	\$100,000	\$100,000
Estimated non-taxable pension amount (50 percent for sworn; 40 percent for Federated)	\$50,000	\$40,000
<b>Potential tax savings</b> (based on estimated 33 percent combined State and Federal tax rate)	<b>\$16,500</b>	<b>\$13,200</b>

As shown in Exhibit 5, the tax advantages of a service-connected disability retirement are considerable. These tax advantages may help explain why significant numbers of San José's sworn employees who have retired after a full career later find it worthwhile to have their service retirement converted to a service-connected disability retirement.

### **Many Sworn Disability Retirees Are Actually Eligible for a Service Retirement**

In many cases, especially with sworn employees, disabled retirees actually received a service retirement prior to the time they were granted a disability retirement. In fact, as shown in Exhibit 6, thirteen of the 22 disability retirement cases that we reviewed met the City's requirements for age and years of service, and retired first on service retirement, but later applied for and were granted a change in status to a service-connected disability retirement.

**Exhibit 6: All 13 of the Change in Status Requests That We Reviewed Were Eligible for a Service Retirement**

<b>Change in Status Requests</b>	<b>Age at Retirement (age 50 for sworn)</b>	<b>Years of Service</b>
Case #1	56	24+
Case #2	50	29+
Case #3	55	30+
Case #4	58	25+
Case #5	54	26+
Case #6	56	30+
Case #7	52	31+
Case #8	56	31+
Case #9	60	31+
Case #10	55	29+
Case #11	60	20+
Case #12	53	30+
Case #13	59	33+

Source: Retirement Services Department.

These 13 employees who first retired on a regular service retirement had been retired for as little as a few months to as long as a few years, before requesting that their service retirement be converted to a disability retirement. For example, one of our sample cases involved a 56 year old fire captain who had been with the City for 30 years and who had suffered a series of orthopedic injuries over the course of his career. This retiree first retired on a service retirement; 4 years later his service retirement was converted to a disability retirement.

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**Workers' Compensation and Disability Retirement Benefits Are Interwoven and Produce an Environment That Generates a Comparatively High Number of Workplace Injury Claims Among Sworn Employees**

Along with the economic incentives, the workplace in the City of San José seems to have evolved into an environment in which its sworn employees file an inordinately high number of workers' compensation claims.

During our 2009 audit we learned that many injured workers file multiple claims in the years just prior to their retirement. In fact, 21 of 23 retirees we reviewed as part of that audit with service-connected disability retirements between 2000 and 2004 (all sworn employees), filed workers' compensation claims during the two years leading up to their retirements.

Our 2009 analysis also seemed to affirm that some sworn employees file workers' compensation claims in the years just prior to their retirement to increase their chances for a service-connected disability retirement, which may help to explain why 2 out of 3 of our firefighters are retiring on a permanent disability.

One recommendation from the 2009 audit was to propose structural changes to the City's Workers' Compensation Program that would reduce the City's policy of providing up to nine months of disability leave supplement pay at 85 percent for non-sworn and one full year at 100 percent for sworn employees. The City reduced the supplement for non-sworn. However, the City was unable to make reductions in the disability leave supplement pay for sworn employees due to a change in State law effective January 2010, that extended *4850 Benefits* (i.e., California public safety employees entitled to one full year of disability leave at 100 percent pay) to sworn employees in the City of San José.

Another recommendation from the 2009 audit was to implement a workers' compensation offset for sworn employees receiving disability retirement payments that replicates the offset for retired non-sworn employees. This issue is discussed further in Finding II of this report.

## Disability Retirement

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### **Disability Benefits and Sick Leave Payouts**

The fact that employees can cash out unused sick leave provides another powerful economic incentive to fully utilize the City's disability leave and disability retirement system. San José employees who suffer a workplace injury are often not required to use sick leave to recover because the City provides temporary and supplemental disability leave payments equal to the salaries of the employees while they are off work recovering.

As a result, an employee who retires on a disability can receive a cash payment at the time of their retirement to pay them for the value of their unused sick leave. For example, three sworn employees whose service-connected disability retirements were approved by the Board in January 2010, received a total of almost \$83,000 in sick leave payouts.<sup>6</sup>

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### **A More Independent Process for Reviewing and Approving Disability Retirements Is Essential**

While the Federated Board has heard 108 disability retirement applications over the past eleven years, the Police & Fire Retirement Board has heard nearly 4 times that, or 405 applications. Given that the retirement boards hear such a high number of applications for disability retirements, it is important that the City have an objective and independent process that looks out for the interests of its injured workers while at the same time safeguarding the two retirement funds from unsupported claims.

#### **A Disability Review Committee Would be More Independent**

Other cities and counties use different approaches than San José's two retirement boards for reviewing applications for disability retirements. One approach is to have a disability committee composed of staff members who are experienced in the field of workplace injuries and disabilities make the decision on the eligibility of an applicant for a disability retirement. Such a system would provide a more independent analysis supporting a disability retirement decision performed by qualified disability experts.

Currently, the Police & Fire Retirement Board, which hears most of the City's disability retirement applications, is comprised of four active or retired members of the City's police and fire departments and five independent members who make the decision on disability retirements. These board members are not experts in the field of work-related disabilities or workers' compensation. Also, the City's Police & Fire Retirement Board includes active and retired police and firefighters in the decision to approve another police officer's or firefighter's disability retirement, a situation that creates an appearance of a lack of

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<sup>6</sup> The issue of sick leave payouts to disability retirees is discussed further in Finding III.

independence that in our view should be avoided. In other words, these four board members are placed in the awkward position of having to attempt to make an impartial benefit determination based on sometimes conflicting medical evidence about officers or firefighters that they may have worked with.

The Federated City Employees' Retirement System is administered by a seven-member Board of Administration composed of four members of the public, two City employees, each from a different City department, who are members of the Federated City System, and one person who retired under the provisions of the Federated City System. After a review of each application, a committee of two senior Retirement Services Department staff makes a recommendation to approve or deny an application to the retirement board.

As noted earlier, the composition of the boards has recently changed. The current public members of the two boards were appointed in December 2010 and February 2011.

The City of San Diego has struggled with the issue of retirement board independence. In September 2004, the City of San Diego Pension Reform Committee recommended that *"An additional provision should be made to the City Charter that would codify the current disability retirement determination process as it is now except that the hearing officer's decision would be final rather than a recommendation to the Board for approval."* The purpose was to ensure independence and technical competence in making disability determinations.<sup>7</sup>

#### **Other Jurisdictions Use a More Formal Hearing Process in Front of a Disability Review Committee**

Two years ago, in response to a request from the Police & Fire Retirement Board, the Retirement Services Department (department) conducted a survey of other California jurisdictions to learn how others make the determination to approve or deny an application for a disability retirement. The department discovered that other cities and counties are using a variety of processes.

Many plans have a formal process that involves a hearing presided over by a hearing officer, in which evidence is presented, witnesses are questioned and cross-examined, and in which attorneys representing the applicants and the retirement board make closing arguments. In San José, the full Police & Fire Retirement Board follows an informal process to determine an applicant's eligibility for a disability retirement. Applicants seeking a disability retirement attend a public hearing of the Police & Fire Retirement Board, along with their attorney, where their case is discussed. While the applicant is represented by an attorney who advocates on their behalf, the City's retirement boards are not similarly represented.

<sup>7</sup> <http://www.sandiego.gov/pensionreform/pdf/finalreport.pdf>

## Disability Retirement

According to the department's survey, other retirement plans rely on a less formal process, in which a separate disability committee (made up of members of the governing board) makes the initial determination on a disability retirement. In other jurisdictions, some combination of the more formal hearing process and the less formal disability committee or a staff committee process is used to review applications for disability retirements. In most cases, the governing board is the final approval body on each application.

Like San José's Federated City Employees' System Retirement Board, Oakland, Portland, and CalPERS rely on a committee of experienced staff to do an initial review of each application, and to make a recommendation as to the approval or denial of each applicant's request for a disability retirement.

### **Exhibit 7: Comparison of Disability Review Process**

	<b>Review of the Application</b>
City of Oakland (a CalPERS agency)	After a review of each application, a committee of city staff who are experienced in the field of workplace injuries/disabilities, makes a recommendation to approve or deny the application to the Retirement Board.
City of Portland	After a review of each application, the fund administrator makes a recommendation to approve or deny the application to the Retirement Board. Appeals of unfavorable determinations can be made to an independent hearing officer experienced in workplace disabilities.
CalPERS	State retirement law grants staff the authority to approve/deny disability retirement applications. Appeal of unfavorable determinations may be reviewed by an Administrative Law Judge, after review of the case by a CalPERS attorney. Finally, the case is submitted to the CalPERS Board for concurrence, further evaluation, or reversal.
City of San José- Non Sworn	After a review of each application, a committee of two senior Retirement Services Department staff makes a recommendation to approve or deny the application to the Federated Retirement Board.
City of San José- Sworn	After reviewing each application, the Police And Fire Retirement Board makes the decision to approve or deny the applicant's request for a disability retirement.
Social Security Administration	Trained staff makes the determination of an applicant's disability based on eligibility requirements, medical evidence, and a comprehensive list of well-established technical guidance. Appeal of unfavorable determinations may be decided by a separate Social Security Administration office or by an Administrative Law Judge.

Source: Phone interviews

### **In at Least One Instance San José Granted a Disability Retirement to an Employee Whose Injury Did Not Appear to be Work-related**

In a case that came before the Federated Retirement Board in 2009, the board granted a disability retirement to an 11-year employee in spite of a recommendation by the staff committee that pre-screens applications that this employee not be granted a disability retirement. Also, after reviewing the medical evidence presented by the treating physician along with the employee's application, the board's Medical Director found no objective medical information supporting that this employee's injuries were work-related. Furthermore, the staff committee found that the employee's injuries did not prevent the employee

from carrying out the duties of the job. In other words, this applicant only met one of the three conditions (see page 21) for being eligible for a disability retirement. But the Federated Board granted a disability retirement anyway.

It appears that the interests of the applicants are well represented during the retirement boards' process. Sworn applicants, in particular, are often accompanied by their own attorneys to a public hearing in which their application for a disability retirement is to be heard. However, the interests of the retirement boards are not comparably represented. While the boards have a City attorney and contract for a second attorney to ensure the boards' process for hearing a disability retirement application is followed, these attorneys are not there to advocate for the employer's interests on any application for a disability retirement.

We believe that the interests of the City and the applicants for a disability retirement would be better served by a new model for reviewing disability retirement applications.

**Recommendation #2: We recommend the City Council take steps to amend the Municipal Code to reconfigure the City's process for reviewing disability retirement applications so that: (1) the decision to grant or deny an application for a disability retirement is made by a disability committee made up of individuals with experience in disability and workers' compensation laws; (2) applicants who wish to appeal the decision of the disability committee may appeal the committee's decision to a board-appointed Hearing Officer; and (3) the City has its own legal counsel to advocate for its interests at the disability hearings.**

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**Eligibility Requirements Force the Retirement Boards to Retire-out Any Disabled Worker for Whom the City Cannot Find an Alternative Position**

The City and the retirement boards find their choices limited when they attempt to find an alternative position that takes into account the physical restrictions of its injured employees. The prescriptive language in the City Charter (specifying that the injured employee must be disabled from doing their job or another job in the same classification) necessitates that the City provide a disabled employee a lifetime disability retirement if it is unable to provide the injured employee a job within their own job classification. This provision creates a hurdle which the City is seldom able to overcome.



## Disability Retirement

### **The Police & Fire Retirement Board Approves Nearly All Requests for Disability Retirements**

The Police & Fire Retirement Board reviews the medical evidence presented from the applicant's treating physicians, from the boards' Medical Director, and from any independent medical exams, if applicable, before deciding on an employee's application for a disability retirement. Applicants appear before a public hearing of the boards, often accompanied by their own attorneys on the day their case is to be heard. Members of the boards vote whether or not to approve each application for a disability retirement.

As shown in Exhibit 8, the Police & Fire Retirement Board approves applications for disability retirements at a higher rate than the Federated Board. The Federated Board has approved 72 percent of the applications between 2000 and 2010, while the Police & Fire Retirement Board has approved 94 percent.

#### **Exhibit 8: The Police & Fire Retirement Board Approves Nearly All Requests for Disability Retirements**

	Police & Fire			Federated		
	Requests for Service-Connected Disability and Change in Status	Denials	Percent Approved	Requests for Service-Connected Disability and Change in Status	Denials	Percent Approved
2000	45	3	93%	9	2	78%
2001	54	3	94%	11	1	91%
2002	26	4	85%	9	1	89%
2003	51	4	92%	7	1	86%
2004	49	5	90%	9	3	67%
2005	31	2	94%	7	0	100%
2006	21	0	100%	17	3	82%
2007	32	0	100%	4	2	50%
2008	17	0	100%	10	4	60%
2009	32	0	100%	15	5	67%
2010	47	4	91%	10	8	20%
<b>TOTALS</b>	<b>405</b>	<b>25</b>	<b>94%</b>	<b>108</b>	<b>30</b>	<b>72%</b>

Source: Summary of Board agendas and minutes

Other California jurisdictions appear to be somewhat more stringent in their approvals. The City's 2007 study on the impact of working conditions on disability retirements found that three other jurisdictions had approved 84 percent of firefighter applications and 82 percent of police applications.

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**The City's Eligibility Requirements for a Disability Retirement Need Reform**

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Many of the sworn employees that the Police & Fire Retirement Board allows to retire on a service connected disability retirement are still able to work and were still working at the time they separated from the City. This raises the question of how these employees could be considered eligible for a disability retirement when they were able to work right up to the time that they retired.

In 10 of 22 of our sample cases, 9 of whom were sworn, employees were either doing their own job or a modified duty job at the time they separated from the City by retiring on a service retirement. Even the boards' Medical Director's analysis of the medical evidence presented by the treating physicians confirmed that each of these employees had an ability to still do some type of work for the City, in spite of the injuries they suffered. Nonetheless, after their service retirement, these employees successfully applied to the Police & Fire Retirement Board to have their retirement converted to a disability retirement.

The Municipal Code affords the Police & Fire Retirement Board the authority to exercise its judgment and discretion in approving a sworn employee's application for a disability retirement. After a review of medical evidence presented by treating physicians and by the City Physician, it is up to the judgment of the Police & Fire Retirement Board, to determine an applicant's eligibility for a disability retirement.

Nonetheless, this finding suggests that San José sworn employees can still be capable of work, but at the same time be found eligible for a disability retirement. Given this finding and the fact that the City has had limited success in addressing the physical restrictions of its sworn employees, the City's eligibility requirements appear to be out of step with the practical and organizational difficulties the City confronts.

**Eligibility Determination Process as Outlined in the City Charter and Municipal Code**

Under the City Charter and the Municipal Code, to be eligible for a disability retirement, a San José employee must have suffered a workplace-related injury/illness, that permanently prevents them from doing their job, and they cannot do another job that the City may offer to transfer them to, given their work restrictions. Currently, the retirement boards review each applicant's file to ensure that evidence has been presented that documents the presence of all three of these conditions before granting a disability retirement. That is,

- Has the employee suffered a disabling injury?
- Does the injury prevent the employee from continuing to do their City job, or such other job in the classification that the City could identify that the applicant can perform in spite of their injuries?
- Was the injury work-related?

## Disability Retirement

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The City Charter provides that if the City cannot identify another job in the classification that addresses the employee's physical restrictions, the employee is eligible for a disability retirement. This basically means that the City must make a good faith offer of employment.

### **Some Employees Who Were Granted Disability Retirements Were Working Full Time in Their Regular Job Right up to When They Separated From the City**

In San José, to be eligible for a disability retirement, the injured worker must be permanently unable to perform the duties of their current job. An injured police officer, for example, would not be able to chase, apprehend, and arrest suspects because of their injury. An injured maintenance worker whose job requires that he or she lift heavy objects would be considered disabled if their disability prevented them from heavy lifting.

However, in 3 of our 22 sample cases, in which the Police & Fire Retirement Board approved the employee's application for a disability retirement, the employee had worked right up to the time of their service retirement. This condition raises a question about how these employees could be considered eligible for a disability retirement when they were still working at their jobs when they service retired.

The Municipal Code establishes that one of the prerequisites for a disability retirement is that the employee be permanently unable to do their City job. In our three cases, however, in spite of having suffered work related injuries, the employees were doing their jobs right up to the time they separated from the City on a service retirement. In all three cases, after having already separated from City employment and having been retired on a service retirement for from one to four years, these employees successfully converted their service retirement to a disability retirement.

### **Some Employees Who Were Granted Disability Retirements Were Working Full Time in a Modified Duty Position Right up to When They Separated from the City**

In an additional seven of our 22 sample cases in which the San José retirement boards approved the employees' applications for a disability retirement (one Federated employee and six sworn employees), the employees had been working in modified duty positions at the time they separated from the City – mostly in the Police Department.

When employees are injured on the job, the injured employee may still be able to do work, just not the duties of the job they held at the time of their disabling injury. Therefore, before an applicant can be found eligible for a disability retirement, the City must determine whether it is able to provide the injured employee an appropriate alternative job. That is, the City could provide a

different job or a light duty job that the employee would be able to do even with their disability, thereby allowing the employee to continue to work, and avoiding the scenario in which the only choice left to the retirement board is to grant the injured employee a disability retirement.

This process of attempting to provide an appropriate job to the injured worker in spite of the injured worker's disabling condition is an essential step in the process for determining an injured worker's eligibility for a disability retirement under the City's current system.

The Police Department has set aside a limited number of permanent modified duty jobs that can be assigned to officers who have been injured on the job and can no longer carry out the full duties of a police officer. In the six cases involving sworn employees, these employees applied for a disability retirement after having separated from City employment and having been already retired on a service retirement for some period of time.

Exhibit 9 summarizes the employment status of ten disability retirees (one Federated employee and nine sworn employees) immediately preceding their retirement. In each case it was determined that the injury was work-related and that the disability was permanent. In three cases, the employee was doing their own job at the time they retired. In seven of the cases, the employee was doing a modified duty job at the time of their retirement.

**Exhibit 9: Employment Status of 10 Disability Retirees  
Immediately Preceding Their Retirement**

	<b>Injury was Work- Related</b>	<b>Permanent Disability</b>	<b>Employee Was Doing Their Own Job At The Time They Retired</b>	<b>Employee Was Doing Modified Duty Job At The Time of Their Retirement</b>
1	√	√	√	
2	√	√	√	
3	√	√	√	
4	√	√		√
5	√	√		√
6	√	√		√
7	√	√		√
8	√	√		√
9	√	√		√
10	√	√		√

Source: Retirement Services Department

## Disability Retirement

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### **Many Retirees Are Allowed to Apply to Have Their Service Retirement Later Converted to a Disability Retirement**

After an employee separates on a service retirement, the Municipal Code allows the retired employee to later request a change of status, in effect changing their service retirement to a service-connected disability retirement. The City Charter actually requires employees to apply for a disability retirement while they are still employed by the City. According to the boards' Medical Director, the City allows this practice because the employee may still be recovering from their work-related injuries at the time that the employee separated from their City employment on a service retirement. The passage of time from when the employee retires to when they apply for a disability retirement allows the retiree to recover as well as they are probably going to before they are eligible to apply for a disability retirement.

In 13 of the 22 approved disability retirements that we sampled, the employee later converted their service retirement to a service-connected disability retirement. In each of these 13 instances, as part of determining the eligibility of the employee for a disability retirement, the City and the Retirement Board went through the process of determining whether the City was able to show that it could provide an appropriate job to the injured worker in spite of the employee's work restrictions.

To us this seems like an empty exercise, since in all 13 cases, the employees had signaled their intention to separate from their City jobs by retiring from the City on a service pension anywhere from a year to five years earlier. These employees would not likely be interested in coming back to work for the City, even if the City could find them a job that could address their work restrictions. In 2000, the City negotiated a limit to the amount of time between when a sworn employee retired on a service retirement to when the retiree then applied to have that retirement converted to a disability retirement – one year for Police & Fire and four months for Federated employees.

### **San José's Definition of Eligibility Is Overly Burdensome**

To be found eligible for a disability retirement, the retirement boards must find that an applicant's injury prevents the employee from continuing to do their City job, or such other job that the City could identify that the applicant can perform in spite of their injuries. More specifically, the injured employee must be disabled from doing their job or another job in the same classification which they can perform in spite of their permanent work restrictions. This provision of the City Charter and the Municipal Code creates an obligation on the part of the City to provide a disabled employee a lifetime disability retirement when it is unable to offer the employee a job within their own job classification. This provision creates a hurdle which the City is typically unable to overcome.

In our 22 sample cases in which the boards approved a disability retirement, in only three cases was the City able to find an appropriate job for the employee given the physical restrictions of the injured worker seeking a disability retirement. This was in spite of the fact that all of the 22 disabled retirees in our sample were deemed to have work restrictions that the boards' Medical Director found to be "prophylactic," that is, the employee was still be able to work, as long as the job the employee worked in was modified to account for the employee's work restrictions.

#### **Not All Jurisdictions Base Eligibility on Whether a Job Is Available**

As shown in Exhibit 10, not all employers we contacted have created as restrictive a scenario as here in San José, in which the employer must attempt to address the injured worker's restriction by providing the worker another job in the same classification. Furthermore, other employers are not obligated to provide a lifetime disability retirement payment to an injured employee because the employer could not provide the injured employee an alternate job in the same classification that took into account the injured employee's work restrictions.

#### **Exhibit 10: Eligibility Requirements for a Disability Retirement**

	<b>Eligibility for a Disability Retirement</b>
City of Portland-Sworn Employees	Employee is unable to perform his/her requested duties because of an injury/illness arising in the course of the employee's employment in the bureau of fire or police.
City of Los Angeles-Sworn Employees	Employee is permanently disabled due to a workplace injury from duties of their current job and any light duties that could be assigned.
<b>Social Security Administration</b>	Employee is severely injured, is not working and is not able to do the work they did previously or <u>any other work</u> .
<b>City of San José-NonSworn</b>	Employee is permanently disabled due to a workplace injury from doing the duties of their current job and any other office or position in the same classification of offices or positions to which the City may transfer him or her.
<b>City of San José-Sworn</b>	Employee is permanently disabled due to a workplace injury from doing the duties of their current job and any other office or position in the same classification of offices or positions to which the City may transfer him or her.

Source: Phone interviews, San Jose City Charter and Municipal Code

The City of Los Angeles, for example, is not as prescriptive as San José in defining what constitutes an employee's eligibility for a disability retirement. In Los Angeles, an injured employee is not considered eligible for a disability retirement unless the employee's disability prevents the employee from doing their own job or any other light duty job that could be assigned.

**Social Security Imposes Much Tougher Conditions Before Granting Disability Benefits**

Similarly, the U.S. Social Security Administration imposes much tougher conditions before it will deem a worker 100 percent disabled. In screening applicants for disability benefits, Social Security adheres to a process that involves five questions about the severity of the worker's disability and the worker's ability to do work. If Social Security finds that the worker is currently working, then the worker is not considered disabled. Further, if the worker is able to do the work they did previously or can make an adjustment to some new type of work, then the Social Security Administration will find the worker not eligible for a disability benefit.

**Private Sector Approaches**

Two private sector employers that we surveyed also follow a different approach for addressing employees incurring disabling injuries at work.

The Human Resources representatives from both publicly traded companies that employ tens of thousands of people and are headquartered here in Santa Clara Valley, told us that when an employee sustains a serious injury at work, an injury that prevents them from doing their jobs, the injured employee is allowed 7 weeks off work at full pay. At the end of this time if the employee is still not able to return to work, the employee is paid a monthly annuity equal to two-thirds of their pay for a period of up to 2 years tax free. If after 2 years, the employee is still not recovered enough to return to work, the company directs the employee to the Social Security system to determine the extent of the employee's permanent disability and their eligibility for an annuity from the Social Security system.

**Recommendation #3: We recommend the City Council consider amending the City Charter and the Municipal Code to clarify that the purpose of the disability retirement benefit is to provide a stable source of income for employees who are incapable of engaging in any gainful employment but are not yet eligible to retire (in terms of age or years of service), and to limit disability retirement benefits to those employees who are incapable of engaging in any gainful employment.**

**Recommendation #4: We recommend the City Council take steps to amend the Municipal Code to require employees to declare their intention to apply for a disability retirement at the same time that they file for a service retirement.**

## Finding II Some Disabled Retirees Have Already Been Compensated for Their Work-Related Injuries

In accordance with the Municipal Code (3.36.1030), disability retirement payments to sworn employees are not reduced by workers' compensation payments. Both the City's Disability Retirement Program (administered by the City's retirement plans) and the Workers' Compensation Program were established to fairly compensate for a work-related injury. During this audit we found that the City amply compensated its disability retirees – first through workers' compensation payments, and then through disability retirement payments. During the course of their employment, the 22 employees in our sample approved for a disability retirement filed from 3 to 40 workers' compensation claims for which the City paid a total of about \$7.1 million. Nineteen of the 22 cases were sworn employees. A 2008 consultant's report estimated a disability retirement offset would produce cost savings of \$1.7 million per year; in 2009 the City estimated the lack of a disability offset for sworn employees cost the City \$2.8 million.

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### Workers' Compensation Costs in Addition to Retirement

In our sample cases, nearly all (21 of 22 employees approved for disability retirement) were employees on whose behalf the City made payments for medical treatments, payments for temporary disability, and indemnity payments for injuries these employees suffered during the time they worked for the City. In addition, many of these employees are entitled to post-retirement future payments that cover permanent disability awards and may also be entitled to receive additional temporary disability leave and medical costs.

Exhibit II shows an estimated \$7.1 million in workers' compensation costs for the 22 disability retirees in our sample in addition to their disability retirement benefits.

#### Exhibit II: Workers' Compensation Costs Associated with the 22 Disability Retirees in Our Sample

	Total Cost	Average Cost	Range of Costs
Indemnity Payments	\$2,729,516	\$129,977	\$39,912 - \$255,786
Medical Costs	2,090,201	99,533	27,258 - 262,745
Future Payments	2,293,511	109,215	6,968 - 729,001
<b>TOTAL</b>	<b>\$7,113,228</b>	<b>\$338,725</b>	<b>\$100,430 - \$1,247,533</b>

Source: Workers' Compensation Claims Database



## Disability Retirement

The above costs include about \$4.5 million in payments to others, and about \$2.6 million paid to the retirees in our sample:

- \$1.1 million in temporary disability payments;
- \$1.1 million in permanent disability payments; and
- \$429,000 in additional permanent disability awards.

Exhibit 12 shows the workers' compensation-related payments for one retiree in our sample.

### **Exhibit 12: Sample of One Retiree's History of Injury/Claims Cost (Does Not Include Disability Retirement Benefits)**

Date	Description	Cost
1985-1990	7 workers' compensation claims	\$17,537
1994-1998	3 additional claims	\$2,030
2001-2005	5 additional claims	\$41,443
2006-2008	4 additional claims	\$285,000 <sup>8</sup>
	<b>SUBTOTAL</b>	<b>\$346,010</b>
1985-2008	Disability leave paid	\$99,545
2008	Service retirement	
Fall 2009	Permanent disability award on basis of previous claims	\$64,538
Winter 2009	Status change to disability retirement	
	<b>COST TO DATE</b>	<b>\$510,093</b>

Source: Workers' Compensation Claims Database

## **Other California Cities Offset Sworn Personnel Disability Retirement Benefits**

The City of Los Angeles reduces employees' disability retirement payments by the amounts they have been awarded through the City's Workers' Compensation Program.<sup>9</sup> Section 1212 of Los Angeles' City Charter states:

*Coordination of Pension Benefits. If, pursuant to general law, an award of compensation is paid on account of injury, sickness or death caused by or arising out of employment as a Department Member, then the total amount of any disability or survivor pension granted pursuant to any Tier of the Fire and Police*

<sup>8</sup> Includes \$187,000 potential future payments on 3 open claims.

<sup>9</sup> Los Angeles recovers both temporary disability (TD) and permanent disability (PD) amounts that employees with a disability retirement received over their years of employment. Los Angeles may also recover any future TD or PD these employees may have been awarded. Recovery is accomplished by reducing disability retirement payments – either taking a lump sum amount or reducing each monthly check by 25 percent until all workers' compensation-related benefits have been repaid.

*Pension Plan shall be reduced by the total amount of the awarded compensation and the amount remaining after reduction shall be the pension granted.*

A California Court of Appeals citation regarding this City of Los Angeles Charter section which mandates the reduction states –

*Such a charter provision preventing an employee's "double recovery" of indemnity for an industrial disability is legally proper. It has been repeatedly held that a city may protect itself against paying twice (through the workmen's [sic] compensation provisions of the Labor Code and its own retirement system) for the same industrial disability.*

Also, the City and County of San Francisco Summary Plan Description for police officers and firefighters informs those who are granted an industrial disability retirement benefit that their disability benefit may be reduced by any workers' compensation payments received for related injuries.

Many of San José's sworn employees who have retired on a disability retirement have a history of workers' compensation claims for injuries these employees suffered over the course of their careers with the City. At the time these injuries took place, the City provided compensation to these employees in the form of payment for medical treatments, indemnity payments for each injury, and temporary disability payments.

For the 22 sample cases, the City paid over \$7 million to cover medical treatment, cash payments to compensate the injured workers for their injuries, temporary disability payments, and reserves for potential future payments. Eleven of the disabled retirees had been awarded permanent disability and began receiving such payments after they retired. Some will continue to collect permanent disability until 2013 and 2014.

In our April 2009 report on the City's Workers' Compensation Program we highlighted this issue and made a recommendation to stop these overpayments to sworn retirees. Federated employees who retire on disability are subject to the offset while sworn employees are not. As a result, we recommended the offset be imposed upon sworn employees as it is on non-sworn employees. The City has yet to adopt this recommendation, so we repeat it here. It should be noted that this will require meet and confer proceedings be held with the San José Police Officers' Association and International Association of Firefighters, Local 230.

**Recommendation #5: Take steps to change the Municipal Code to impose a retirement benefit payment offset for sworn employees receiving disability retirement payments that replicates the offset for retired non-sworn employees.**

Disability Retirement

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### **Finding III Sick Leave Overpayments Should Be Addressed**

The City of San José pays for accumulated sick leave upon retirement. The amounts paid are outlined in the bargaining agreements and are based on the employee's hourly rate of pay at the time of retirement. When Police and Fire employees with 1,200 or more accumulated sick leave hours (1,201 or more for Fire) are approved for a service retirement, they are entitled to 100 percent sick leave payout on an unlimited number of their accrued/unused sick leave hours. In cases when a Police or Fire employee later requests a change in status from a service retirement to a service-connected disability retirement, these employees are required to pay back part of the total sick leave payout – 25 percent for Police and 20 percent for Fire. Although most City employees have repaid the difference as agreed, as of March 2011, the City was pursuing about \$149,000 due from nine employees for partially or totally uncollected balances.

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#### **A Change in Status to Disability Retirement May Require Repayment of Sick Leave Payouts**

When an employee initially retires on a service retirement then later converts that to a disability retirement, the employee is required to pay back to the City a specific portion of the cash payment that they received. Meanwhile, however, the employee has use of the money in the interim. The repayments are set up as receivables in the City's Financial Management System (FMS) and invoices are sent to those individuals with money due the City.

As shown in Exhibit 13, we found that:

- the required sick leave repayment amounts were sizeable;
- the City is accepting partial or installment payments even though retirees signed a statement acknowledging a lump sum repayment is expected upon conversion from service to service-connected disability retirement; however;
- portions of payments are up to 51 months outstanding; and
- one individual owes the City nearly \$65,000 and has repaid nothing since invoiced in September 2010.

**Exhibit 13: Overdue Sick Leave Repayments as of March 16, 2011**

	Initial Amount Owed	Initial Billing Date	Last Payment Date	Current Balance*	Number of Months Outstanding
1	\$51,915	9/16/2010	None	\$64,919	6
2	\$24,955	11/20/2006	2/7/2011	\$12,955	51
3	\$27,173	4/16/2008	None	\$27,173	35
4	\$13,874	4/16/2008	3/3/2011	\$5,749	35
5	\$16,555	1/22/2009	3/1/2011	\$10,555	25
6	\$25,694	1/22/2009	12/2/2010	\$4,282	25
7	\$24,721	2/11/2010	4/29/2010	\$12,446	13
8	\$37,708	2/11/2010	4/28/2010	\$8,321	13
9	\$2,314	2/1/2011	None	\$2,568	1
Total	\$224,909			\$148,968	

\* Includes interest and penalties

Source: Finance Department

In five of the nine cases, the City has not received a payment for over six months. Given that each of these individuals are receiving a monthly retirement check from the City's retirement funds, the City should be able to collect from these individuals.

Many sworn employees who go before the Police & Fire Retirement Board to have their service retirement applications approved also have service-connected disability retirements pending. They anticipate their work-related injury or illness will reach maximum medical improvement in the near future so they can officially be pronounced disabled and request board approval for a change in status from a service retirement to a service-connected disability retirement. For example, the January 15, 2009 Police & Fire Retirement Board agenda listed 63 sworn employees requesting the board approve their service retirements. The agenda indicated that 26 of these employees, over 40 percent, also had service-connected disability retirements pending.

In our opinion, sworn employees qualified for 100 percent payout of their sick leave who service retire with a service-connected disability retirement pending, should have the initial sick leave payout amount reduced in accordance with the Memoranda of Agreement by the amount they will be required to repay to the City when their retirement status changes (20 and 25 percent for Fire and Police, respectively.) By so doing, the City will avoid the process of invoicing employees for repayment and, in some cases, waiting years for reimbursement. In the event disability retirement is denied, the employee would be repaid. This may not be an issue if contract negotiations result in elimination of sick leave payouts, as the City has proposed.

**Recommendation #6: We recommend that the City take aggressive steps to collect the outstanding balances it is owed from those retirees who still have not fully repaid the City the amounts they were overpaid for their unused sick leave. If sick leave payouts are not eliminated as part of contract negotiations, payouts should be reduced when a disability retirement is pending to avoid future overpayments.**

## **Conclusion**

The rate of disability retirements among San José's sworn employees is unacceptably high. Although improvements can be made, it does not appear that San José is an unsafe place to work. Other factors that contribute to the high rate of disability retirements need to be addressed – a more independent process for reviewing and approving disability retirements is essential, and eligibility requirements for disability retirement need reform.

### **RECOMMENDATIONS**

**Recommendation #1:** We recommend the City fully implement, with a goal towards making permanent, the Fire Department's pilot Wellness Program requiring that all firefighters must meet minimum fitness standards (including changes to the firefighters' annual fitness examination) or be on a corrective action plan to achieve a minimum standard of fitness.

**Recommendation #2:** Take steps to amend the Municipal Code to reconfigure the City's process for reviewing disability retirement applications so that: (1) the decision to grant or deny an application for a disability retirement is made by a disability committee made up of individuals with experience in disability and workers' compensation laws; (2) applicants who wish to appeal the decision of the disability committee may appeal the committee's decision to a board-appointed Hearing Officer; and (3) the City has its own legal counsel to advocate for its interests at the disability hearings.

**Recommendation #3:** We recommend the City Council consider amending the City Charter and the Municipal Code to clarify that the purpose of the disability retirement benefit is to provide a stable source of income for employees who are incapable of engaging in any gainful employment but are not yet eligible to retire (in terms of age or years of service), and to limit disability retirement benefits to those employees who are incapable of engaging in any gainful employment.

**Recommendation #4:** We recommend the City Council take steps to amend the Municipal Code to require employees to declare their intention to apply for a disability retirement at the same time that they file for a service retirement.

**Recommendation #5:** Take steps to change the Municipal Code to impose a retirement benefit payment offset for sworn employees receiving disability retirement payments that replicates the offset for retired non-sworn employees.

**Recommendation #6:** We recommend that the City take aggressive steps to collect the outstanding balances it is owed from those retirees who still have not fully repaid the City the amounts they were overpaid for their unused sick leave. If sick leave payouts are not eliminated as part of contract negotiations, payouts should be reduced when a disability retirement is pending to avoid future overpayments.

Disability Retirement

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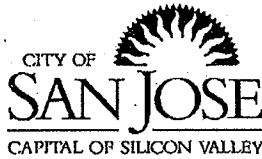
## APPENDIX A

### Sample Disability Retirement Cases

The following table presents information on the sample of 22 approved disability retirements and 2 denied disability retirements that we reviewed in detail as part of this audit. The table summarizes the retirees' departments, the type of workplace injuries they suffered, their years of service, the number of workers' compensation claims filed, and approval or denial of their applications for a disability retirement. As the table shows, for most of these retirees the injuries they suffered were a variety of orthopedic injuries incurred throughout the course of their careers with the City Police or Fire Departments.

Department	Injuries	Years of Service	Number of Prior Workers' Compensation Claims	Retirement Board Action
Police	Throughout career: Neck, back, right shoulder	20+	26	Approved
Police	Radial nerve compression and carpal tunnel	10+	5	Approved
Transportation	Neck and back	3+	1	Denied
Fire	Throughout career: Neck, shoulder, elbow, thumb, back, knee	25+	17	Approved
Fire	Throughout career: Neck, shoulders, back, elbow, knees, fingers	30+	10	Approved
Fire	Throughout career: Back, neck, knees, heart	25+	10	Approved
Fire	Throughout career: Heart, back, hip, knee, neck	25+	8	Approved
Fire	Throughout career: Multiple orthopedic, heart	30+	17	Approved
Police	Arm, back	10+	4	Approved
Fire	Degenerative disc disease	10+	10	Approved
Fire	Throughout career: Neck, shoulders, back, hips, knee, heels	30+	40	Approved
Police	Psychiatric	15+	16	Approved
Police	Back	30+	3	Approved
Fire	Throughout career: Shoulders, back, heart	30+	20	Approved
Fire	Throughout career: Head, neck, spine, ribs, hips, knee	15+	17	Approved
Police	Throughout career: Neck, knee, psychiatric, heart	25+	25	Approved
Police	Throughout career: Shoulders, back, hands, thumbs	20+	24	Approved
Police	Throughout career: Hands, fingers, knee, palm	30+	30	Approved
Police	Neck	5+	6	Approved
Fire	Throughout career: Back, lungs, shoulders, knees, heart	30+	19	Approved
Police	Back, hand	15+	8	Approved
Police	Heart	25	13	Denied
Police	Hand, shoulder, psychiatric	20+	0	Approved
Police	Immune system disorder	15+	5	Approved





# Memorandum

**TO:** SHARON ERICKSON  
CITY AUDITOR

**FROM:** Alex Gurza

**SUBJECT:** RESPONSE TO THE AUDIT OF  
"DISABILITY RETIREMENTS:  
A PROGRAM IN NEED OF REFORM"

**DATE:** April 11, 2011

Approved

Date

4/11/11

The Administration has reviewed the audit of San Jose disability retirements and is in general agreement with the recommendations identified in the report. Many of the recommendations are items already under consideration. For example, Recommendation #1 regarding the Fire Department's pilot wellness program was a result of the agreement reached with the San Jose Fire Fighters in March 2011. It is the City's goal to use this pilot wellness program to evaluate continuing and expanding the program on an ongoing basis. As another example, Recommendation #5 regarding workers' compensation offset is a subject under consideration in the ongoing negotiations with the San Jose Police Officers' Association.

Given the figures contained in the audit regarding the number of disability retirements, we agree that the rate of disability retirements is unacceptably high. The City and employees have experienced a significant increase in contributions from Fiscal Year 2009-2010 to Fiscal Year 2010-2011. Given recent actuarial reports, the City expects retirement costs to rise dramatically in the upcoming years. It is projected that the City's total retirement costs will exceed \$400 million in Fiscal Year 2015-2016. This is unsustainable.

There will be significant focus on retirement reform efforts in Fiscal Year 2011-2012. The City is currently in negotiations with seven of its eleven bargaining units and retirement reform is a topic of those negotiations. The City has already reached an agreement with four bargaining units, and there are agreements with those four bargaining units to continue discussing the topic of retirement reform.

The information provided in the audit report will be information considered by the Council when providing direction to the City Manager regarding retirement reform.

The City Manager's Office thanks the City Auditor's Office for its comprehensive and informative review of the City's disability retirements that will serve as another source of valuable information for the City's retirement reform efforts.

Alex Gurza  
Director of Employee Relations

*For additional information on this report, contact Alex Gurza,  
Director of Employee Relations, at 535-8150.*